[redacted]

Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 532.

CENTRAL NEW ENGLAND RAILWAY COMPANY,
PETITIONER,
v.
BOSTON & ALBANY RAILROAD COMPANY, ASSIGNOR FOR THE BENEFIT OF NEW YORK CENTRAL RAILROAD COMPANY, ASSIGNEE,
RESPONDENT.

MOTION AND REPLY BRIEF OF THE PETITIONER.

Now comes the petitioner and says that the respondent's brief states that certain allegations of the petition obviously are not supported by the record.

Wherefore the petitioner prays that it may be permitted to file the reply brief attached hereto.

By its Attorney,
JOHN L. HALL.

PETITIONER'S REPLY BRIEF.

The respondent's brief submitted in this matter states certain allegations of the petition are obviously not supported by the record. So far as the federal questions which the petitioner seeks to have decided by this Court are concerned, few of the subjects covered by the criticized allegations seem of major importance, but the respondent has raised the issue, and in order that this Court may have before it the full situation, and ready references to the parts of the record supporting the statements of the petition, we submit the following brief:

On page 12 of the respondent's brief it is said, in the paragraph numbered 1, that the allegation of the petition that petitioner "constructed the branch line referred to" is obviously not supported by the record. This suggestion of the respondent clearly ignores the contract on which the respondent has brought suit, because that contract, attached to the respondent's declaration and appearing in the record at pages 47 to 51, inclusive, states (Rec. top of page 48) as of October 25, 1899, that the petitioner is constructing and will shortly complete the branch line in question.

Also on page 12 of the respondent's brief it is stated, in the paragraph numbered 2, that the record does not support the petitioner's statement that it "operated the branch with a gradually decreasing number of trains." Near the bottom of page 64 of the record in your Court it is stated that the petitioner continued its operation "with gradual decrease in the number of trains operated." This language is contained in the opinion of the Supreme Judicial Court of Massachusetts. It is taken verbatim from page 3 of the respondent's bill of exceptions for use in that Court, which bill of exceptions, by stipulation, was made no part of the record in your Court.

In the paragraph numbered 3 on page 12 of its brief the respondent refers to its argumentative interpretation of the *certificate* of the Interstate Commerce Commission, as showing that the record does not support the statement in the petition that the petitioner applied to the Interstate Commerce Commission for a certificate covering the abandonment of its operation over the branch and the Boston & Albany tracks from Feeding Hills into Springfield. Irrespective of the inaccuracy of the respondent's interpretation of the certificate, the petitioner's statement as to its application to the Commission is entirely supported by the language of that application (original Exhibits, p. 12), paragraph 3 of which states that the petitioner proposes to abandon the operation of the branch from Feeding Hills to Agawam Junction and also to abandon "the operation of its trains between said junction and Springfield, Massachusetts, over the tracks of the Boston & Albany Railroad."

And in the paragraph numbered 4 on page 12 of its brief the respondent claims that the record does support the statement of the petition that termination of the contract on which suit is brought was necessarily incidental to the petitioner's carrying out the Commission's order. The record and exhibits show that the only connection between the petitioner's lines of railroad and those of the Boston & Albany was in accordance with the contract at Agawam Junction. The abandonment of the line from Feeding Hills to Agawam Junction therefore made it physically impossible for the petitioner's trains to come onto the lines of the Boston & Albany. After the abandonment no operation under the contract could possibly take place. The entire record, particularly the testimony as to the impossibility of operation on pages 23 and 25, clearly supports the petitioner's statement that the termination of the contract on which suit is brough. was a necessary incident

of the petitioner's acting under the Commission's order. To suggest that the petitioner confuses termination of operation under the contract with termination of the contract itself does not affect the record's support of the petitioner's statement, because the termination of the contract, which was based on operation, necessarily follows termination of operation, and because the question which the petitioner now seeks to have this Court review is whether or not there is any liability on the petitioner.

Furthermore, it is claimed in the respondent's brief, particularly on pages 11, 21, and 26, that the petitioner has not presented any federal question. This claim is without merit because it appears clearly from the petitioner's answer (Rec. p. 39), the charge of the trial judge (Rec. p. 36), the petitioner's brief before the Massachusetts Supreme Judicial Court (pages 28 to 33, inclusive), and the opinion of that Court (Rec. pp. 66 to 67), that the petitioner has fully perfected its rights under the federal statutes. Irrespective of the theories or arguments advanced by the petitioner in support of its position, the federal questions have been adequately raised in the lower Courts and it happens that those questions were raised upon the same theory as is presented in the petition and brief before this Court.

To demonstrate this with relation to the particular matters referred to on the above-mentioned pages of the respondent's brief, namely, the importance of any specific intention of the Commission, we quote from pages 28 to 30 of the petitioner's brief before the Supreme Judicial Court of Massachusetts:

> "The commission is merely exercising the delegated judgment of Congress as to whether or not there is occasion for action. That judgment being exercised and action taken by issuance of an order, the effect of the order is to be determined by the provisions of the

Transportation Act not by what the commission may have determined nor by the benefits or burdens of the situation as viewed by this Court.

"*Colorado* v. *United States*, 211 U.S. 153, at 167, where it is said: (quotation omitted)

* * * * * * * * * *

"Under the above quotation it (the Interstate Commerce Commission) has acted in the interests of interstate commerce as a whole to alleviate a drain and burden upon the defendant in its interstate operations. Its order would be most impotent and ineffective in relieving the interstate operations of the defendant from a burden if the defendant relies on the order and ceases operation only to be faced with a liability for damages. By Act of Congress, as distinguished from the Commission, the defendant is given a defense to this action. To be of any real value to the defendant in interstate commerce the order must have such scope that the defendant can fully and freely rely on it.

* * * * * * * * * *

"In the third place the carrier has no alternative but to act under the commission's order and to seek to abandon what it cannot 'efficiently and economically' operate, for (if it does not) it will be disregarding the mandate of Congress contained in Section 15a (2) and (3) of the Interstate Commerce Act for 'honest, efficient and economical management.' By so doing it not only jeopardizes its rates (see Sec. 15a) and allows an unreasonable burden on interstate commerce to continue but also affects the prospect of the United States receiving as trustee any excess income."

It appears clearly from the last paragraph above quoted that the petitioner made the same argument before the said Supreme Judicial Court on the basis of section 15*a* (2)

and (3) of the Interstate Commerce Act as is made in its brief before your Court, so that the suggestion of the respondent to the contrary, made on page 26 of its brief, is misleading.

As expressed by the Transportation Act of 1920 the clear intent of Congress to build up a national transportation system has frequently been recognized by this Court. The failure to protect the petitioner from liability in the case at bar will render ineffective the pertinent provisions of that statute and defeat the recognized legislative purpose.

We therefore submit that a writ of certiorari should issue because the record clearly shows federal questions properly raised, which as yet have not been decided by this Court, and which are of great interest and importance to the public and your petitioner.

JOHN L. HALL,
MARCIEN JENCKES,
Counsel.

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No. 532.

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PETITIONER,
v.
BOSTON & ALBANY RAILROAD COMPANY,
ASSIGNOR FOR THE BENEFIT OF THE
NEW YORK CENTRAL RAILROAD COMPANY,
ASSIGNEE, RESPONDENT.

BRIEF FOR THE CENTRAL NEW ENGLAND RAILWAY COMPANY.

This case is before this Court on a writ of certiorari granted January 2, 1929, to review the proceedings and judgment of the Superior Court of Massachusetts. The judgment was rendered against the petitioner for breach of contract. Exceptions by both parties were dismissed by the Supreme Judicial Court of the Commonwealth. The Federal questions presented are raised by the Interstate Commerce Act as amended by the Transportation Act of 1920 (41 U.S. Stats. 456, 474; 49 United States Code Ann. sec. 1 (18-21)) and the certificate of the Interstate Commerce Commission (Rec. pp. 46-47) issued under sec. 1, pars. 18 to 21 thereof, upon which the petitioner relied as a defense to the action brought and which the Massachusetts Courts held did not constitute such a defense.

STATEMENT OF THE CASE.

The suit was brought by the New York Central Railroad Company for breach of a contract dated October 25, 1899

(Exhibit 3, Rec. p. 47). This contract was executed as a result of a previous agreement, dated May 9, 1898 (Exhibit 28, Original Exhibits, p. 3), between The Boston & Albany Railroad Company, The Philadelphia, Reading & New England Railroad Company, its reorganization committee, and The Hartford & Connecticut Western Railroad Company. This earlier agreement, which set out *verbatim* all the terms of the contract sued on, contemplated the organization of the petitioner and the construction of a branch line to connect with the lines of The Boston & Albany upon the location and construction of which the petitioner and The Boston & Albany Railroad Company were to make the contract sued on. The branch line was to be constructed from the south through Feeding Hills, Connecticut, to a point of connection on The Boston & Albany known as Agawam Junction, Massachusetts, a distance of four miles from the City of Springfield, Massachusetts. The petitioner was to run its trains into Springfield over the tracks of The Boston & Albany under the license which ran until August 30, 1940, provided for by the contract sued on. The branch line was to be the only physical connection between the rails of the petitioner and those of The Boston & Albany. The only way that the petitioner could use The Boston & Albany tracks covered by the contract was by coming from the south through Feeding Hills over this new branch line.

The petitioner received by the contract no right to run any trains over the line of The Boston & Albany between the connection point and Springfield. There were no stations on the Central New England between Feeding Hills and Springfield. The petitioner's only right was to pass over with its trains about four miles of Boston & Albany tracks. Operation by the petitioner was therefore *entirely dependent* upon and ancillary to the operation of its trains from the south through Feeding Hills to the point of connection.

The map shown on the fly page opposite is reproduced from part of the blueprint map which appears in the record before the Interstate Commerce Commission (Exhibit 32, Original Exhibits, p. 30). This map shows clearly the physical situation which made it physically impossible for the petitioner's trains to come onto the lines of The Boston & Albany otherwise than over the petitioner's line from Feeding Hills to Agawam Junction. Unless that section of the petitioner's line was in existence and in operation, it would be impossible to operate under the second contract, Exhibit 3.

Within a month after the execution of this second contract (Rec. pp. 47-50) on which suit was brought, The Boston & Albany Railroad had been leased, by Exhibit 1, to the corporate predecessor of the New York Central Railroad Company.

The branch line was completed in 1902 and was operated for approximately nineteen years, until revenue and expenses for the operation from Feeding Hills into Springfield showed a loss for the year 1920 alone of $38,832.58 (Exhibit 32, Original Exhibits, p. 24).

In 1921, after investigation, the Interstate Commerce Commission issued an order authorizing the abandonment by the petitioner of this branch line between Feeding Hills and The Boston & Albany, and the petitioner, on December 15, 1921, ceased operation in accordance with the order of the Commission (Rec. p. 58; Exhibit 26, Rec. p. 24). It was the contention of the plaintiff at the trial that, despite the petitioner's cessation of operation, the plaintiff should receive up to August 30, 1940, the $15,000 per annum specified in the contract. The petitioner has been held liable to pay a verdict of $169,012.72, rendered February 23, 1927.

This was so, even though the Interstate Commerce Commission, on a record replete with every pertinent historical and economic detail, had issued its order authorizing the abandonment of the branch line, the use of which was es-

sential to the passing of the petitioner's trains over the tracks of The Boston & Albany.

The physical situation at Agawam Junction is well illustrated by the map reproduced herewith and by Exhibits 23, 24, 25, and 35. It is about four miles from Agawam Junction to Springfield. Agawam Junction is 1.86 miles from Feeding Hills, Connecticut, and about 14 miles from Tariffville, Connecticut (Rec. pp. 19, 26).

The layout at Springfield is well illustrated by Exhibits 22, 24, and 29, and it is described on pages 25 and 26 of the record.

The New York Central Railroad Company was the original plaintiff, basing its rights upon two assignments (Rec. pp. 2 and 3):

1. That of The Boston & Albany Railroad Company to the New York Central & Hudson River Railroad Company, dated November 15, 1899, contained in the lease of The Boston & Albany Railroad to the New York Company (Exhibit 1), and—

2. That of the New York Central & Hudson River Railroad Company to it contained in the consolidation agreement (Exhibit 2).

By amendment allowed June 19, 1928, after the rescript from the Supreme Judicial Court, The Boston & Albany Railroad Company, assignor for the benefit of the New York Central Railroad Company, became the plaintiff.

Outline of Facts.

The contract on which the suit was brought contains a single "whereas" clause referring to Exhibit 28 and the construction of the line to connect with The Boston & Albany. The claim against your petitioner is for breach of the obligation contained in paragraph first of the contract, Exhibit 3 (Rec. p. 48). This paragraph provided generally that from and after the opening of the branch line

for the passage of regular trains until the 30th day of August, 1940, The Boston & Albany Railroad Company was to "license and permit, subject to the regulation and control" by itself of the train movement, the petitioner and its successors "to pass with trains and locomotives over the line of the Albany Company between the point of connection west of the Connecticut River and the yard and engine houses at West Springfield in each direction, and further for passenger trains across the bridge over the Connecticut River and into the Union Station at Springfield, with the right to use in connection with such trains all water stations and other facilities necessary for the accommodation of such trains and the traffic to be transported by them," the petitioner "paying to the plaintiff therefor fifteen thousand dollars ($15,000) per annum in equal quarterly payments on the first days of January, April, July and October of each year, the first payment to be made upon the first quarterly period next succeeding the opening of said branch line for the passage of regular trains."

The first paragraph also provided for proportionately increased payments if the number of trains exceeded a specified number, and for payment to be made by the petitioner if it used the Albany's water stations or engine stalls.

The second paragraph of the body of the agreement provided rates for the transfer of freight cars.

The third paragraph required the Albany Company to sell tickets, handle baggage, and take care of passenger trains, and transfer through passenger cars to connecting lines.

The fourth paragraph provided for the petitioner to build and maintain an interlocking tower at the junction of its road and the Albany.

The fifth paragraph dealt with the ascertainment and apportionment of responsibility in case of accident or loss.

The sixth paragraph provided that the petitioner should make payments required by the contract in accordance with the terms thereof.

The seventh and last paragraph dealt with the transfer of the contract rights and the effect of bankruptcy, etc.

When the line was constructed it was the intention to have another route for business from the Southern and Middle states, but the traffic never materialized, as competitive lines retained the business (Original Exhibits, p. 29).

Operation by the petitioner over the branch line and into Springfield began on September 15, 1902, and continued with a gradually decreasing number of trains operated until December 15, 1921. Payments were made by the petitioner for all charges billed against it under the contract up to and including December 15, 1921. The suit brought, therefore, sought to recover only payments to be made in the future (Rec. pp. 5, 62).

In May, 1921, the petitioner filed, under section 1 of the Interstate Commerce Act as amended by the Transportation Act of 1920 (41 Stat. at Large, 474; 49 U.S. C.A. sec. 1 (18-21)), an application with the Interstate Commerce Commission for a certificate of public convenience and necessity, permitting the abandonment of operation of its line between Feeding Hills and Agawam Junction (Exhibit 32, Original Exhibits p. 12). The required statutory notice of the petition and proceeding was duly given and pursuant to the requirements of the statute and the Commission the application was published in full. This application set forth that a certificate was sought permitting the abandonment of operation of the petitioner's line between Feeding Hills and Agawam Junction, and that the petitioner proposed "to abandon the operation of that portion of said branch between the station at Feeding Hills in the town of Agawam and said Junction and in addition to abandon the operation of its trains between said junc-

tion and Springfield, Massachusetts, over the tracks of the Boston & Albany Railroad."

The record of the proceedings before the Interstate Commerce Commission (Original Exhibits, pp. 11 to 36) shows, among other things, the contract of October 25, 1899, between the Central New England Railway Company and The Boston & Albany Railroad Company, setting out the payment to The Boston & Albany of $15,000 per annum, the financial condition of the petitioner, a copy of its balance sheet, its income statements for each of the five years next preceding the current year as well as for a portion of the current year, the fact that only a portion of the track north of Feeding Hills was to be abandoned, the amount of passenger and freight traffic which was handled for each of the five years next preceding the current year and the revenue derived from each class, the fact that the volume of traffic, freight and passenger, had diminished during recent years, that the total business of the petitioner for the five years ending December 31, 1920, resulted in a loss of $4,226,356.95 and that there was a total loss for 1920 from operating the branch line of $38,832.58.

The record before the Commission also shows that the proposed abandonment was from a point 350 feet northerly of the passenger station at Feeding Hills to the end of the branch at Agawam Junction as indicated on a plan, that it was the intention to abandon the operation of trains between Agawam Junction and Springfield over the tracks of The Boston & Albany as indicated on a blueprint (see reproduction thereof, opposite page 3 of this brief), "it now being handled under rental agreement."

It was further disclosed to the Commission that there was not sufficient volume of traffic over the line proposed to be abandoned "to warrant continuation of the high operating cost including the expense of rental for the use of the Boston & Albany tracks, signal station at Agawam Junction and passenger and freight facilities at Spring-

field, making it essential in the interest of economical operation that the proposed abandonment be effected" (Original Exhibits p. 29).

Among other things the Commission found that the trains of the petitioner entered Springfield by using four miles of The Boston & Albany Railroad; that under the trackage agreement the applicant was to pay The Boston & Albany $15,000 a year for the right to operate over the track; that the petitioner proposed to abandon about 1.87 miles of track from Feeding Hills to its connection with The Boston & Albany and that for the year 1920 the line showed an *operating* loss of $38,832.58. This figure included the $15,000 contract charge (Original Exhibits, p. 24).

The proceeding was submitted to the Commission on September 3, 1921. It was decided September 8, 1921, when the Commission issued its certificate in which it was ordered that the petitioner be authorized to abandon the line of railroad (Exhibit A, Rec. p. 45; Exhibit 32, Original Exhibits, pp. 34 to 36).

By letter dated November 9, 1921 (Exhibit 7, Record, p. 8), the plaintiff was informed that the defendant, by virtue of the certificate of the Commission, proposed to discontinue operation into Springfield and to cease to use the privileges of Exhibit 3. On December 14, 1921, the defendant operated its last train out of Springfield. The petitioner's line from Feeding Hills to Agawam Junction was abandoned for service or operation (Rec. pp. 25, 26). Within a few months the physical connection at Agawam Junction was severed. It became legally and physically impossible for the petitioner to operate its trains over the tracks of The Boston & Albany into Springfield (Rec. pp. 23, 25). After the abandonment no operation under the contract could possibly take place. It follows that the termination of the contract on which suit is brought was a necessary incident of action by the petitioner in accordance with the certificate and order of the Commission.

This action to recover damages at the rate of $15,000 a year for more than eighteen years was begun in April, 1922. At the trial the petitioner claimed that the original plaintiff had suffered no damages by reason of the cessation of operation because the cost to the original plaintiff, if the petitioner operated the full contract allowance of trains, would be as much or more than $15,000 a year. The original plaintiff, on the other hand, contended that it should be allowed to recover the full $15,000 a year without deduction because the petitioner had entirely repudiated the contract and because it received no benefit from the petitioner's failure to operate.

Specification of Errors.

The petitioner contends that the amended Interstate Commerce Act and the certificate and order of the Commission issued thereunder are a defense to the action brought. The judgment of the Superior Court of Massachusetts as affirmed by the Supreme Judicial Court has denied to the petitioner the protection of proper Congressional legislation. It is submitted that a mandate should issue from this Court ordering judgment to be entered for the defendant because the Courts of Massachusetts have erred in the following ways:

1. By denying the petitioner's motion (Rec. p. 29) that the Court direct a verdict in its favor (see the charge of the trial judge, Rec. p. 36).

2. By denying the petitioner's request (Rec. p. 30) that upon all the evidence the plaintiff was not entitled to recover.

3. By granting the request of the plaintiff, respondent (Rec. p. 30), that as matter of law it was no defense that the petitioner abandoned its line of railroad and ceased operation into Springfield in pursuance of and reliance on the certificate of the Interstate Commerce Commission.

4. By ruling (Rec. p. 36) that as matter of law the certificate of the Commission could not affect the contractual rights of the respondent.

5. By ruling (Rec. pp. 36, 69) that, so far as the question of liability is concerned, all consideration of the certificate of the Commission was to be dismissed.

6. By denying the petitioner's amended motion to dismiss (Rec. pp. 30, 45).

Statutes Involved in the Case.

Interstate Commerce Act, as amended by the Transportation Act of February 28, 1920, 41 Stat. at Large, 456, 477, sec. 1, pars. 18 to 21, incl. (49 U.S. C.A. 1 (18-21)):

> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.
>
> "(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission

may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any direc-

tor, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: Provided, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

Judicial Code, sec. 24, amended, 28 United States Code Annotated, sec. 41 (28):

"The district courts shall have original jurisdiction as follows:

". . . (28) Of cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission. (June 18, 1910, c.

309, § 1, 36 Stat. 539; Mar. 3, 1911, c. 231, § 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)"

Judicial Code, sec. 208, 28 United States Code Annotated, sec. 46:

"Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. (June 18, 1910, c. 309, § 3, 36 Stat. 542; Mar. 3, 1911, c. 231, § 208, 36 Stat. 1149.)"

Outline of Argument.

1. The amended Interstate Commerce Act and certificate and order of the Commission issued thereunder protect the petitioner from any liability in this action.

1. The Scope and Purpose of the Amended Interstate Commerce Act.

2. Exercise by the Interstate Commerce Commission of its Authority under the Amended Interstate Commerce Act has the Effect of Congressional Legislation.

3. The Statute and the Certificate and Order of the Commission are Paramount over Obligations Arising from Private Contracts or even Explicit Charter Provisions.

4. The Statute and Order of the Commission Issued in the Case at Bar Protect the Petitioner from the Liability Sought to be Enforced against It.

(*a*) The Commission's finding of public convenience and necessity and its unconditional order protect the petitioner's action thereunder.

(*b*) The recognized intention of Congress protects the petitioner in the situation at bar.

(*c*) The permissive nature of the order of the Commission and the petitioner's initiative in obtaining it are immaterial.

(*d*) The specific intention of the Commission as to any particular contract is immaterial.

(*e*) The proceedings before the Commission were proper.

(*f*) The accounting nature of the payment under the contract is such that the petitioner should be protected from the liability at bar.

(*g*) Other authorities and examples distinguished. The question of hardship.

5. The Opinion of the Supreme Judicial Court of Massachusetts.

6. The Congressional Purpose would be Nullified by the Enforcement Against the Petitioner of the Liability Involved in the Case at Bar.

II. There was no jurisdiction in the Massachusetts Courts to hear the cause.

III. Conclusion.

Argument.

I. The Amended Interstate Commerce Act and the Certificate and Order of the Commission Issued Thereunder Protect the Petitioner from Any Liability in This Action.

1. The Scope and Purpose of the Amended Interstate Commerce Act.

The Transportation Act of 1920 (41 U.S. Stats. 456, 474) amending the Interstate Commerce Act was an exercise of the paramount Congressional power under the Federal Constitution to regulate interstate and foreign commerce.

By that statute Congress introduced into Federal legislation a new railroad policy.

> *Railroad Comm. of Wisconsin* v. *Chicago, Burlington & Quincy R.R.*, 257 U.S. 563, 585.

This new purpose of developing and insuring an adequate national transportation system was expressed by Congress in unequivocal language.

> *New England Divisions Case*, 261 U.S. 184, at 189, and footnote.

As stated by the Chief Justice in the case sustaining the constitutionality of the recapture provisions of the Act (sec. 15*a*), *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U.S. 456, at 478:

> "The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

In its opinions dealing with various provisions of the amended Interstate Commerce Act, this Court has made clear the broad scope of the Congressional purpose to build

up and maintain through the supervision of the Interstate Commerce Commission an efficient national transportation system able to meet promptly and adequately the needs of the country.

Railroad Comm. of Wisconsin v. *Chicago, Burlington & Quincy R.R.*, 257 U.S. 563.
New York v. *United States*, 257 U.S. 591.
Railroad Comm. of Calif. v. *Southern Pac. Co.*, 264 U.S. 331.
Texas v. *Eastern Texas R.R.*, 258 U.S. 204; 264 U.S. 79.
United States v. *Hubbard*, 266 U.S. 474.
Texas & Pac. Ry. Co. v. *Gulf, C. & S.F. R.R. Co.*, 270 U.S. 266.
Colorado v. *United States*, 271 U.S. 153.
Alabama & Vicksburg Ry. Co. v. *Jackson & Eastern Ry. Co.*, 271 U.S. 244.

2. Exercise by the Interstate Commerce Commission of its Authority under the Amended Interstate Commerce Act has the Effect of Congressional Legislation.

In the Interstate Commerce Act as amended by the Transportation Act of 1920 Congress broadly exercised its power and occupied the field of interstate commerce by taking possession of the following (among many other) branches of regulation of interstate commerce and interstate carriers:

1. Establishing through routes and joint rates, sec. 1 (4), sec. 15 (1), (3), and (4).

2. Furnishing facilities for interchange of traffic, sec. 1 (4).

3. Construction of switch connections, sec. 1 (9).

4. Construction and abandonment of lines, sec. 1 (18-21).

5. Discrimination, preference, etc., between persons, localities, or connections, sec. 3 (1) and (3).

6. Publication of rates and schedules, sec. 6.

7. Discrimination against interstate commerce, sec. 13 (4).

8. Routing of traffic, sec. 15 (8-10).

9. Return on investment, sec. 15*a*.

10. Issuance of securities, sec. 20*a*.

The regulation of these and other fields through the Interstate Commerce Commission is to accomplish the building up and maintenance of a national transportation system adequate for the growing needs of the public. The different provisions of the Act are parts of the Congressional plan to accomplish this great purpose. Each section is to be interpreted in the light of the underlying purpose of the legislation which aimed to give owners of railways an opportunity to efficiently maintain their properties.

The Act put the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission. The Commission's supervision of the abandonment by railroads of old lines was one of the means whereby the great Congressional purpose was to be achieved.

> *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U.S. 456, at 478.

Action by the Commission under any section of the Act is an exercise of the delegated power of Congress. The power is exercised in the interests of interstate operations (*Colorado* v. *United States*, 271 U.S. 153, at 162). The legislative effect of Congressional action results immediately from any action of the Commission taken in pursuance of the statutory provisions. Action by the Commission within the scope of the Act is as final and effective as action

by Congress. As stated by this Court in the most recent decision giving effect to the very provisions of the statute involved at bar, *Colorado* v. *United States, supra,* at 166:

> "The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission."

By the statute Congress prescribed the powers and duties of the Commission and specified the way it should act. The effect of the Commission's exercise of the delegated power of Congress is the effect of an Act of Congress. Courts will not review determinations of the Commission made within the scope of its power, or substitute their judgment for its findings.

United States v. *New River Co.*, 265 U.S. 533.
Interstate Comm. Comm. v. *Illinois Central R.R. Co.*, 215 U.S. 452.
New England Divisions Case, supra.
Colorado v. *United States, supra.*

3. The Statute and the Certificate and Order of the Commission are Paramount over Obligations Arising from Private Contracts or even Explicit Charter Provisions.

The completeness of the Constitutional grant to Congress of power over interstate commerce and contracts involved therein has never been questioned. It may even be used to prohibit (*United States* v. *The William*, 28 Fed. Cases, 614, where embargo laws of 1807 and 1808 were upheld. *The Lottery Case*, 188 U.S. 321). Certainly any contract dealing with interstate commerce is subject to an infirmity that Congress may legislate so as to alter that contract. Such legislation is paramount in its field and cuts across public or private arrangements of any

kind. It is not to be hampered or restricted to any extent by contracts previously made between individuals or corporations.

Addyston Pipe & Steel Co. v. *United States*, 175 U.S. 211.
Louisville & Nashville R.R. Co. v. *Mottley*, 219 U.S. 467, 482.
Union Bridge Co. v. *United States*, 204 U.S. 364, 399, 400.
Armour Packing Co. v. *United States*, 209 U.S. 56.
Atlantic Coast Line R.R. Co. v. *Riverside Mills*, 219 U.S. 186.
Minnesota Rate Cases, 230 U.S. 352.
New England Divisions Case, 261 U.S. 184.
Dayton-Goose Creek Ry. Co. v. *United States*, 263 U.S. 456.

Even explicit charter provisions must yield to this paramount power.

Colorado v. *United States*, 271 U.S. 153, 165.
New York v. *United States*, 257 U.S. 591, 601.

Wherever public or private rights interfere with the efficient execution of the activities of Congress under the commerce clause, those rights or interests must give way even without compensation to the person affected thereby.

Union Bridge Co. v. *United States*, *supra*.
Houston East & West Texas Ry. Co. v. *United States*, 234 U.S. 342.
Delaware, Lackawanna & Western R.R. Co. v. *United States*, 231 U.S. 363.
Greenleaf Johnson Lumber Co. v. *Garrison*, 237 U.S. 251.
Louisville Bridge Co. v. *United States*, 242 U.S. 409, 421.

The Commission itself has recognized in two recent decisions that private contracts cannot hamper or restrict the operation of the provisions of the statute which it administers.

> *Abandonment by Chicago, Rock Island & Pacific R.R. Co.*, 131 I.C.C. 421, at 430.
> *Chicago & Alton Railroad Co.* v. *Toledo, Peoria & Western Ry. Co.*, 146 I.C.C. 171, at 181.

The law is clear that in the field of interstate commerce the amended Interstate Commerce Act and action thereunder is absolutely supreme.

4. The Statute and Order of the Commission Issued in the Case at Bar Protect the Petitioner from the Liability Sought to be Enforced against It.

(a) *The Commission's Finding of Public Convenience and Necessity and its Unconditional Order Protect the Petitioner's Action Thereunder.*

In December, 1921, the petitioner discontinued operation into Springfield, Massachusetts, and ceased to use any of the privileges of the contract of October 25, 1899 (Exhibit 3, Rec. p. 47). This discontinuance was by virtue of an order of the Interstate Commerce Commission made after a finding that the convenience and necessity of the national transportation system permitted abandonment of the branch line. In that proceeding the Commission found that the revenue for the year 1920 derived from this line was $2686.04 and the operating expenses $41,518.62, resulting in an operating loss of $38,832.58 (Original Exhibits, p. 24).

The certificate and order of the Commission were issued under paragraphs 18 to 21 of section 1 of the Act. They specifically authorized the petitioner to abandon the line of railroad from Feeding Hills to Agawam Junction. No

one ever questioned that the abandonment of that railroad necessarily involved the cessation of the petitioner's operation into Springfield and the use of the tracks covered by the contract sued on. The contract gave the petitioner no right to operate over the lines of The Boston & Albany independently from service from the south over the abandoned line. The contract was premised upon the operation of that line. The whole situation was before the Commission. The record before the Commission contained a complete historical and financial analysis of the petitioner's situation (Exhibit 32, Original Exhibits, pp. 11-36, incl.). The important terms of contract were incorporated into the certificate issued by the Commission (Rec. pp. 47, 46).

On this record the Interstate Commerce Commission decided that the present and future public convenience and necessity permitted the petitioner to abandon its line of railroad from Feeding Hills to a point where said line connected with The Boston & Albany Railroad. In pursuance of the provisions of the Interstate Commerce Act all matters properly bearing on that question of public convenience and necessity were submitted to and acted on by the Commission. In ruling that the public convenience and necessity permitted the abandonment, the Commission was attempting to relieve the burden on the interstate operations of the petitioner which continued operation would undoubtedly mean. With the entire situation before it, the Commission issued an unconditional certificate and order authorizing the petitioner to abandon its line of railroad.

After the abandonment it was *physically impossible* for the petitioner to operate into Springfield under the contract. The breach of contract for which it is sought to hold the petitioner liable was necessarily incident to an efficient execution of the abandonment authorized.

And further it is to be noted that operation ceased over the branch from Feeding Hills to Springfield. That op-

eration cannot be commenced again without a certificate of public convenience and necessity from the Interstate Commerce Commission because paragraphs 18 to 21 of section 1 of the amended Act prevent the operation of any line of railway or extension thereof unless and until such certificate shall have been first obtained. The abandonment authorized therefore made it legally as well as physically impossible to continue with the contract sued on.

Chicago & Alton Railroad Co., et al. v. *Toledo, P. & W. Railway Co.*, 146 I.C.C. 171, at 180-181, and cases cited in the footnote thereat.
Operation by Illinois Central, 72 I.C.C. 111.
Operation by Southern Pacific Co., 117 I.C.C. 342.
Operation and Abandonment by Atchison, Topeka & Santa Fe Ry., 131 I.C.C. 506.

The determination by the Commission that public convenience and necessity permitted the abandonment is the exercise of power delegated to the Commission by Congress. The action is final and not open to revision in this proceeding. It protects the petitioner in relieving its operations from the burden presented to the Commission. The $15,000 annual contract charge was clearly an element of that burden, for it was included in the operating loss found by the Commission (Rec. p. 46; Original Exhibits, p. 24).

It follows as matter of law that the petitioner should be fully protected in the case at bar because the liability sought to be enforced against it is incidental to and arises directly from an efficient performance of action authorized by the Commission.

As said by this Court in *Colorado* v. *United States*, 271 U.S. 153, at 162, concerning a permissive certificate and order of the Commission identical in form to the one at bar—

> "The certificate issues, not primarily to protect the railroad, but to protect the interstate commerce from undue burdens or discrimination. The commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty."

The Commission, by paragraph 20 of section 1, has the power to attach conditions to orders issued on applications for certificates and orders of abandonment. Such conditions may properly deal with any resulting hardship, and take care of persons, private or public, who object to the granting of an order.

See *Control of Hereford Ry. Co.*, 99 I.C.C. 7.

This power to impose conditions and the legislative nature of the Commission's order both show that the place for any objecting party to be heard is before the Commission or in the Federal Courts, as provided by sections 207, 208, and amended section 24 of the Judicial Code (see section II of this brief, p. 50). The issuance of an unconditional order by the Commission leaves parties affected no remedy but to seek to attack the order in a proper forum with jurisdiction.

In the case at bar the respondent has taken no action before the Commission or the Federal Court. There is no hardship on it, because it has been paid in full for all past performance and it has not suffered any expense by reason of the cessation of operation. The obligation of the petitioner under the contract sued upon is not unlike an obligation that might exist had the petitioner agreed with some shipper to maintain for a definite period a side-track and after the abandonment of the main track covered by an unconditional order of the Interstate Commerce Commission it could no longer furnish side-track facilities. Clearly, in that case, the certificate and order of the Com-

mission would protect the carrier so authorized from liability to the shipper.

It is therefore submitted that the Commission's certificate of public convenience and necessity and the unconditional order of abandonment should protect the petitioner in the case at bar, because the liability sought to be enforced was part of the burden on the interstate operations of the petitioner caused by the operation of the line whose abandonment was authorized.

(*b*) *The Recognized Intention of Congress Protects the Petitioner in the Situation at Bar.*

Paragraph 20 of section 1 of the amended Interstate Commerce Act provides that, without securing other approval than the Commission's certificate, the carrier may proceed with the abandonment covered thereby. It would be an impotent and ineffective attempt to relieve the interstate operations of the petitioner from a burden if the petitioner relies on the order and ceases operation, only to be faced with a liability for damages. By Act of Congress, as distinguished from the act of the Commission, the defendant is given a defense to this action. To be of any real value to the petitioner in interstate commerce the order must have such scope that the petitioner can fully and freely rely on it and be protected from liability in a suit such as the case at bar, which would not have resulted but for the action taken by virtue of the Commission's order.

If the carrier which acts on a certificate of the Interstate Commerce Commission is not free from a civil liability necessarily consequent upon the authorized action, it will mean that in each case the carrier for itself would have to determine which course of action would be cheaper. With such a result the "fostering guardianship and control" of the Commission ceases to have any force, the oft-repeated purpose to develop a national transportation system is

thwarted in violation of the Act of Congress, and the judgment of other persons or Courts substituted for the judgment of the Commission.

Furthermore, the petitioner had no alternative except to abandon the operation involved in the case at bar because section 15*a* (2) and (3) of the amended Interstate Commerce Act makes it mandatory upon the petitioner to abandon, when authorized by the Commission, operations which can not be efficiently and economically conducted. The requirement of the Act and the purpose of the Commission's order was to check the drain on the interstate operations of the petitioner which was caused by the operation of the branch line from Feeding Hills to Springfield. The petitioner's failure to do so would permit the continuation of what the Interstate Commerce Commission had found to be an unreasonable burden on interstate operations. The Congressional mandate for "honest, efficient and economical management" would be violated. The petitioner would not only jeopardize its own rates (see section 15*a*), but also affect the excess income held for the benefit of the transportation system.

It follows that in the case at bar judgment should be entered for the petitioner because the respondent seeks to enforce against the petitioner a liability which resulted directly from the efficient execution of action which the Interstate Commerce Commission, acting under the delegated power of Congress in the interests of developing the national transportation system, found to be permitted by public convenience and necessity.

See *Texas* v. *Eastern Texas R.R. Co.*, 258 U.S. 204; 264 U.S. 79.

In the first opinion in that case this Court held that a certificate and order identical in form with the one in the case at bar were not authority protecting the applicant

where purely intrastate commerce was involved. In that opinion it was said, at page 216, and it is submitted that the language is exactly applicable to the case at bar:

> "The road lies entirely within a single State . . . and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. *It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce.*" (Italics ours.)

It follows that orders of the Interstate Commerce Commission permissive in form and issued on the application of the carrier authorized are complete protection to the carrier in the accomplishing of the Congressional purpose to relieve the carrier's interstate operations from a burden and thereby to build up the national system.

> *Colorado* v. *United States*, 271 U.S. 153.
> *New York* v. *United States*, 257 U.S. 591.
> *New England Divisions Case*, 261 U.S. 184.

In *New England Divisions Case, supra*, it followed upon action of the Commission that numerous private contracts between carriers became wholly or partially unenforcible. This was so even though the Commission made no reference to the particular contracts affected.

In *New York* v. *United States, supra*, a permissive order of the Commission (*Ex Parte 74*, 58 I.C.C. 220), made private contracts and state laws unenforcible when they con-

flicted with efficient execution of the action authorized by the Commission.

In *Colorado* v. *United States, supra,* where it was held that a permissive order of the Commission identical in form to the one at bar was complete protection to the carrier acting thereunder, the order was said to be of such a nature that "even explicit charter provisions" yielded to it.

See also *St. Paul & Tacoma Lumber Co.* v. *Northern Pacific Ry. Co.*, 296 Fed. 749; 4 F. (2d) 359; 269 U.S. 535.

Hawkeye Portland Cement Co. v. *Chicago, R.I. & P. R.R.*, 198 Iowa, 1250; 201 N.W. 16—

where permissive orders of commissions were held to protect the carrier in actions for breach of contract even though the orders of the commissions contained no reference to the specific contract involved.

The situation of the petitioner in the case at bar is clearly within the protection afforded by the intent of Congress as recognized by the above decisions. It must be that when the Commission orders or authorizes an action it follows that the Congressional purpose protects the carrier authorized from efficiently relieving its interstate operations from the burden found by the Commission.

Other decisions of this Court also make it clear that the purpose and interpretation of the Interstate Commerce Act, as amended by the Transportation Act of 1920, are such that it follows as matter of law, when the Commission authorizes an act, that the carrier so authorized shall be protected from liability incidental to or arising directly from an efficient execution of the action authorized.

Wisconsin Railroad Comm. v. *Chicago, B. & Q. R.R.*, 257 U.S. 563.

Dayton-Goose Creek Ry. Co. v. *United States*, 263 U.S. 456.
Railroad Comm. of Calif. v. *Southern Pac. Co.*, 264 U.S. 331.
United States v. *Hubbard*, 266 U.S. 474.
Texas & Pac. Ry. Co. v. *Gulf, C. & S.F. R.R. Co.*, 270 U.S. 266.
Alabama & Vicksburg Ry. Co. v. *Jackson & Eastern Ry. Co.*, 271 U.S. 244.

The act of Congress properly interpreted in a field in which it is paramount requires that all public and private arrangements give way to an economical and efficient execution of action ordered or authorized by Congress itself or by the administrative body which Congress has created to determine the times, places, and conditions of such action.

Congress intended the legislation to build up an adequate national transportation system and to relieve burdens from interstate operations of carriers. The legislation will be rendered ineffective unless a carrier acting under a certificate and order is fully protected from liability in suits such as the one at bar, resulting from an efficient execution of the order.

It results that the petitioner should be protected from the liability in the case at bar because such liability was necessarily and directly involved in the efficient performance of the act ordered authorized by the Commission and a contrary result would nullify the declared and recognized paramount intention of Congress.

Ozawa v. *United States*, 260 U.S. 178, 194.
Taylor v. *United States*, 207 U.S. 120.
Hawaii v. *Mankichi*, 190 U.S. 197, 212.

(c) The Permissive Nature of the Order of the Commission and the Petitioner's Initiative in Obtaining It are Immaterial.

Most of the cases cited above involved orders of the Commission which were permissive in nature. In each case, however, the private contract involved was held modified to such extent as was sufficient to protect fully the efficient execution by the carrier authorized of the Commission's order. It is the intention of Congress which so protects action taken by virtue of certificates or orders issued under the statute. The Commission, by issuing the certificate, states the time and place where the Act of Congress is to be immediately applicable. Private obligations involved are affected by direct force of Congressional intent. Any such effect is not dependent on the Commission's specific or mandatory intent.

The petitioner had no alternative except to act under the order of the Commission and abandon what it cannot "efficiently and economically" operate. Failure to check the drain of its resources as soon as authorized by the Commission would be a violation of the mandate of section 15*a* (2) and (3) of the Interstate Commerce Act for "honest, efficient and economical management." By so doing the petitioner not only jeopardizes its own rates (see section 15*a*) and allows an unreasonable burden on its interstate operations to continue, but also affects the excess income held for the benefit of the transportation system.

It follows that the permissive nature of the Commission's order in the case at bar is no flaw in the petitioner's defense.

It is also clear that the petitioner's own activity as applicant in bringing about the legislative action which it now claims as protection is immaterial, because Congress and the Commission represent and act for the public and interstate commerce as a whole.

New England Divisions Case, supra.
Colorado v. *United States, supra.*
Commissioners v. *Young*, 59 Fed. 96.
Brick Presbyterian Church v. *Mayor of New York*, 5 Cow. (N.Y.) 538.
Dunham v. *New Britain*, 55 Conn. 378.
Scovill v. *McMahon*, 62 Conn. 378.

(d) The Specific Intention of the Commission as to any Particular Contract is Immaterial.

The certificate and order of the Interstate Commerce Commission involved in the case at bar were issued under paragraphs 18 to 21 of section 1 of the amended Interstate Commerce Act. In a proceeding under these paragraphs the Commission acts in the interests of interstate operations (*Colorado* v. *United States*, 271 U.S. 153, at 162). In so acting and determining when public convenience and necessity permit certain things, it acts as an administrative body within a limited legislative field. It weighs the benefits and burdens, exercises its judgment upon the particular facts, and issues or denies a certificate in accordance with the provisions of the statute (*Colorado* v. *United States, supra*, at 165 and 167). Upon such issuance the Congressional legislation becomes effective and paramount. This limited delegation to the Commission is of legislative, not judicial, power. The Commission's action may state the time or place of efficacy, but the result on private or public obligations is the result of the Act of Congress. The Commission's judgment being exercised and action taken by issuance of an order, the effect of the order is to be determined by the provisions of the Federal legislation, not with reference to the Commission's specific intent, nor according to a court's view of the benefit or benefits of the situation.

Colorado v. *United States, supra.*

Houston East & West Texas Ry. Co. v. *United States*, 234 U.S. 342.
Union Bridge Co. v. *United States*, 204 U.S. 364.

Considerations as to the advisability of the Commission's action are quite immaterial in determining the legal effect of the Commission's order. The Commission only considers the expenditures of the applicant as one factor in determining the underlying question, namely, whether the operation of the branch was a burden on the interstate operations of the petitioner. The amount or nature of losses involved in the operation which it is proposed to abandon are for the consideration of the Commission in determining whether or not a certificate of public convenience and necessity should issue. They are not for a court to consider in determining the legal effect of the statute and the Commission's order.

The determining factor on the question of affecting a private contract is the purpose and intent of Congress expressed in the legislation. Private contracts are affected so far as they are related to the accomplishment of that purpose. The specific intention of the Commission as to any particular obligation is quite immaterial, because the effect of action taken in pursuance of that order is determined, not by the Commission's primary intention, but by the intention of Congress.

Colorado v. *United States, supra.*
New England Divisions Case, 261 U.S. 184.
Texas v. *Eastern Texas R.R. Co.*, 258 U.S. 204.
New York v. *United States*, 257 U.S. 591.

In none of the authorities dealing with the effect of certificates or orders of the Interstate Commerce Commission is there any suggestion that the specific intention of the Commission with respect to the particular obligation involved is material. It follows that the Commission's in-

tention as to any particular obligation is immaterial in determining the legal effect of the statute and action thereunder.

(e) The Proceedings before the Commission were Proper.

Paragraph 19 of section 1 of the amended Act contained explicit provisions as to notice and a hearing on applications for certificates of public convenience and necessity under paragraph 18. *The petitioner fully complied with all of these statutory provisions as to notice.* The administrative function of the Commission was fully and properly performed in accordance with the procedure devised by Congress. The consequences of that action cannot be affected by any alleged defect in the notice or procedure prescribed by the statute. Any such claim goes to the propriety of the Congressional enactment, not to the action of the Commission.

The respondent had notice at least as early as November 8, 1921, before operation had ceased, that the petitioner had been authorized by the Commission and was about to cease operation and to discontinue payments under the contract (Exhibit 7, Rec. p. 8). The rules of practice before the Commission, prescribed under authority of section 17 of the Act, gave the respondent an opportunity then to reopen the proceeding 1479 on the Commission's Finance Docket (Rules of Practice before the Commission, 1920, pp. 3, 4, 22). The opportunity for review by a judicial tribunal existed under sections 207 and 208 of the Judicial Code.

Interstate Commerce Comm. v. *Diffenbaugh*, 222 U.S. 42, 49.

Skinner & Eddy Corp. v. *United States*, 249 U.S. 557, 562.

28 U.S. C.A. 41 (27-28 and footnote to 27).

The respondent, however, made no effort to take action in either forum. It has, on the other hand, been content to rest on the proposition that as a matter of law its claim against the petitioner cannot be affected by the order of the Commission and action thereunder (Plaintiff's Request 22, Rec. p. 30). It follows that the respondent cannot now complain of any lack of notice, nor of any illegality or impropriety in the statute or in the Commission's order.

The administrative action of the Commission in the case at bar is of a legislative rather than of a judicial nature.

> *Abandonment by Chicago, Rock Island & Pacific R.R. Co.*, 131 I.C.C. 421, at 430.
> *Colorado* v. *United States, supra.*

If the action is legislative, there is no requirement that parties affected have notice or a hearing. If, however, it is judicial, the opportunity for review is complete protection to the parties affected. It follows, therefore, that the Federal statutes giving the respondent an opportunity for judicial review clearly make the Congressional legislation valid. Therefore it is immaterial that the respondent was not a party to the proceeding before the Commission or that the case was submitted to the Commission "without a formal hearing."

> *Field* v. *Clark*, 143 U.S. 649.
> *Union Bridge Co.* v. *United States, supra.*
> *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U.S. 287.
> *Chicago Junction Case*, 264 U.S. 258.
> *Colorado* v. *United States, supra.*

(f) The Accounting Nature of the Payment under the Contract Shows that the Petitioner should be Protected from the Liability at Bar.

As used generally, and in the opinion of the Massachusetts Supreme Judicial Court (Rec. pp. 69, 70), the phrase

"fixed charge" refers to a charge which is to be paid for the use of a capital asset as distinguished from a purely operating charge. All charges not classed as "operating charges" are necessarily "fixed charges." The Interstate Commerce Commission, the supreme authority in the matter of railroad accounting (section 20 of the Amended Act; *Interstate Commerce Commission* v. *Goodrich Transit Company*, 224 U.S. 194), has repeatedly ruled that contracts such as the one involved in the case at bar do not give to the licensee any rights which can be valued under section 19*a* of the Interstate Commerce Act.

Texas Midland Railroad, 75 I.C.C. 1, at 25.
Kansas City Southern Railway Co., 75 I.C.C. 223, 235, and 248.
Danville & Western Ry. Co., 84 I.C.C. 227, at 230.
Augusta Union Station Co., 97 I.C.C. 586, at 590.

It follows from such rulings that the Interstate Commerce Commission has adjudicated that such charges as the $15,000 payment involved in the case at bar are not fixed charges. It results, therefore, that any payment made for such rights or facilities is an operating, as distinguished from a fixed, charge.

The report of the Commission which was made a part of its certificate (Rec. pp. 46, 47) made a finding as to the *operating* expenses of the branch line which included as an operating expense the $15,000 payment.

This result is confirmed by an examination of the orders of the Interstate Commerce Commission as to the calculation under section 15*a* of the Interstate Commerce Act of net railway operating income. The orders of the Commission dealing with this distinction are on file under the following dates:

Period	Date of Order
For the four months from the taking effect of the Act to December 31, 1920	Jan. 16, 1922
For the year 1921	March 16, 1922
For the year 1922	March 21, 1923
For the year 1923	March 17, 1924
For the year 1924	Jan. 21, 1925
For the year 1925	Jan. 27, 1926
For the year 1926	Feb. 4, 1927
For the year 1927	Jan. 14, 1928

Attached to the orders for the years 1923 through 1927, inclusive, are forms for use by the reporting carriers. Exhibit C of these forms, for the years 1924 to 1927 inclusive, shows in detail what items are to be deducted before the calculation of net railway operating income or deficit. The orders for the years prior to 1924 show that the rules and principles applied and the calculations made are the same as those made for the years 1924 and after, but that in the latter case more detail was required by the Commission. Included among these deductions listed on the form Exhibit C are the following account titles: "Maintaining Joint Tracks, Yards and other Facilities—Dr.," the tenth item from the bottom of page 7 of the 1928 order; "Operating joint Tracks and Facilities—Dr.," the tenth item from the top of page 8 of the 1928 order; "Joint Facility Rents (Account 541)," the third item from the end of Exhibit C on page 8 of the 1928 order.

These titles are the titles of accounts prescribed by the Interstate Commerce Commission for use in the uniform system of accounts by the railroads of the country. The accounts are all explained in two published orders of the Commission, dated May 19, 1914, and respectively entitled: "The Classification of Operating Revenues and Operating Expenses of Steam Roads," and "The Classification of Income, Profit and Loss and General Balance Sheet Accounts for Steam Roads."

For each of the account titles set out above it will be noticed from these orders of the Commission that there are two account numbers, one the debit account to be used by the paying carrier and one the credit account.

Examination of these orders of the Commission and the description and definition of the accounts therein contained shows that the above-mentioned accounts are the ones to which would be respectively charged and credited by the carriers involved payments made on account of the service covered by the $15,000 annual payment.

The only question as to the use of these accounts would be as to the distribution of the total amount paid between the various accounts. This is practically immaterial, because all the accounts mentioned appear as deductions before the calculation of "net railway operating income." They all represent operating rather than fixed charges.

However, if it is important, the apportionment made by the payee assignee in the case at bar in accordance with special instruction 9 of "Classifications of Operating Revenues and Operating Expenses for Steam Roads" is shown on Exhibit 5 (Original Exhibits, p. 1) by account numbers and amounts to be as follows:

Credit Account listed by N. Y. Central (Exh. 5)	Account Title	Amount Credited	Per Cent	Debit Acc't No.
279	Maintaining joint tracks, etc.	750.00	20	278
413	Operating joint tracks, etc.	187.50	5	412
508	Joint facility rents	2812.50	75	541

It seems from the foregoing that the $15,000 payments are operating expenses of the petitioner, Central New England Railway Company.

In this connection it must be noted that account No. 542, "Rent for Leased Road," is not included within the orders of the Commission as to calculation of *operating* income

or deficit. It follows that the account No. 542 represents a fixed charge. The definition of the account shows that it covers only payments for property which is in the complete control of the lessee. The account represents fixed payments made for capital assets as distinguished from account No. 541, which covers only payments made for the use of property without the control thereof.

It is the contention of the petitioner that the accounting nature of the $15,000 contract charge is not material to the determination of the principal question as to the legal effect, on the contract in suit, of the amended Interstate Commerce Act and action thereunder. Whatever name may be given to the item cannot affect the prime circumstances that the wherewithal to pay the charge comes from the operating revenues of the petitioner. The continuation of those payments (or the payment of the judgment rendered against the petitioner) would be a certain drain of that amount upon the petitioner's operating resources. Such a drain was exactly the type of burden on the petitioner's interstate operations which Congress intended to avoid. It follows that whether or not the item is, from an accounting point of view, a fixed or an operating expense, the recognized intention of Congress requires that the statute and certificate be protection to the petitioner in the case at bar.

It is submitted, however, that the contention of the petitioner that it is relieved from liability in the case at bar is strengthened because, as demonstrated above, the $15,000 annual payment is an operating, as distinguished from a fixed, charge. The problem as to the effect upon a lease of a railroad of the statute and a certificate and order of abandonment does not arise. The question before this Court involves only the effect upon an operating expense contract of the statute and order of the Commission. Even the Supreme Judicial Court of Massachusetts, in ruling against the petitioner, recognized that the statute and cer-

tificate covered operating expenses. That Court, however, ruled that the statute and certificate were of no avail to the petitioner as a defense because the $15,000 charge was erroneously believed not to be an operating charge.

See opinion of the Supreme Judicial Court (Rec. pp. 69, 70), particularly where it is said:

> "The end sought by the Commission in issuing the certificate, *the wiping out of the operating loss,* does not involve the removal of the fixed charge for rental." (Italics ours.)

It follows from the operating expense nature of the $15,000 payment that the statute and certificate are a defense to the suit which has been brought in the case at bar.

(g) Other Authorities and Examples Distinguished. The Question of Hardship.

Contracts dealing with interstate commerce are subject to an infirmity that Congress may legislate so as to defeat them. The parties to the contract involved at bar are presumed to know that their rights under that contract are subject to abrogation by action of Congress.

And further in the case at bar the respondent has been paid in full for all service rendered (Rec. p. 5). The branch line was constructed at the expense of the petitioner or its lessor (Rec. p. 48; Original Exhibits, pp. 14, 15). The interlocking tower and connections at Agawam Junction were built and maintained by the petitioner (Rec. p. 50). The respondent has not been put to any expense either by reason of the construction of the branch or by reason of the petitioner's cessation of operation. It follows that no hardship on the respondent exists in the case at bar. On the other hand there is great hardship on the petitioner which would pay future sums per annum as pure

tribute to the respondent for contract privileges which it was legally and physically impossible to use.

It is submitted, therefore, that the respondent's position in the case at bar is not supported by authority based on an "equitable way to adjust the matter." Such authority may be cited by the respondent in the cases of—

Louisville & Nashville R.R. Co. v. *Crowe*, 156 Ky. 27; 160 S.W. 759—

and—

New York Central R.R. v. *Gray*, 239 U.S. 583.

The *Crowe* case was brought in equity by one who had deeded a right of way to the railroad in consideration of an annual pass. The Interstate Commerce Act amendment of 1906 stopped the issuance of such passes. Demurrer was overruled on the authority of the *Mottley* case and judgment for $200 rendered on the pleadings. The *Kentucky* case cites no authority for its conclusion, and gives as reasons that "the equitable way to adjust the matter" is to require the railroad to pay for the right of way purchased and necessarily retained, taking into consideration what appellee has already received and that "some other medium of payment should in good conscience be substituted for the medium which is no longer available."

It is submitted that such a decision can have no effect upon the case at bar, which is an action at law in which the plaintiff respondent has been fully compensated for all service rendered.

It is further submitted that the Supreme Court of Washington has reached the more accurate result in its careful opinion in *Crowley* v. *Northern Pacific Railway*, 68 Wash. 588, which was a case involving the same facts as *Louisville & Nashville Railroad Co.* v. *Crowe*, *supra*, but an even greater degree of hardship. In that case the plaintiff and his wife in 1898 conveyed a tract of land in Spokane to the defendant for annual passes during his life. The

defendant performed until the passage of the Commerce Act of June 29, 1906, after which it refused to perform. The value of the property at the time of the conveyance was $15,000 and at the time of the action it was $200,000. The action was to rescind or have damages, the *Mottley* case (219 U.S. 467) being conclusive as to no specific performance. Rescission was denied because of changed circumstances. A judgment for damages was reversed and judgment entered for the defendant because full performance had been arrested "by the Congress of the United States acting within its constitutional powers."

New York Central R.R. v. *Gray, supra*, was a case in which an architect had prepared plans and rendered service for the railroad which had promised to give him an annual pass. The action for damages, after the 1906 Interstate Commerce Act amendment, was allowed on a *quantum meruit* basis. The decision rests upon the restoration of consideration past due and has no reference to the question in the case at bar of rights *in futuro*.

This *Gray* case and *Louisville & Nashville R.R. Co.* v. *Crowe, supra*, can be regarded as nothing more than attempts, because of hard situations, to get away, on an equitable basis, from the clear law that a subsequent Act of Congress which excuses or prevents performance is a complete defense. Such a doctrine can apply to the case at bar only in favor of the petitioner, because anything further received by the respondent would be in the nature of a penalty paid by the petitioner for compliance with the certificate and order of the Commission.

In the case at bar argument is made that an order of the Commission could not affect a promise to pay interest, and so the petitioner's obligation on the contract of 1899 cannot be affected. We submit that Congress could affect a railroad's promise to pay interest, and under the amended Interstate Commerce Act that result can practically be accomplished by regulation of rates and valuation of

property. Wherever obligations of carriers relating to interstate commerce interfere with the efficient execution of the activities of Congress under the commerce clause those obligations must fall and even without compensation to a person affected thereby.

Union Bridge Co. v. *United States*, 204 U.S. 364, at 401.

Houston East & West Texas Ry. Co. v. *United States*, 234 U.S. 342.

Delaware, Lackawanna & Western R.R. Co. v. *United States*, 231 U.S. 363.

Greenleaf Johnson Lumber Co. v. *Garrison*, 237 U.S. 251.

Louisville Bridge Co. v. *United States*, 242 U.S. 409, at 421.

Furthermore, the analogy suggested can have no weight because the obligation of the defendant under the contract (Exhibit 3) is not a general obligation to pay, but only a promise to pay, limited by force of the "whereas" clause and the language of the agreement to the existence of the branch connection from the south. The purchaser of this obligation can see this possibility on the face of the contract which by its nature is subject to the infirmity of Congressional action, so that when there is action which results in the non-existence of the branch connection there is no difficulty about excusing the defendant, whose obligation to pay was not general but distinctly limited to the existence of that branch.

Recent decisions of the Interstate Commerce Commission showing the extent to which the Commission has acted under paragraphs 18 to 22 of section 1 of the Transportation Act in relieving carriers of the burdensome obligations of special contracts are:

Control of Hereford Railway, 99 I.C.C. 7.

Abandonment of Branch Line by New York, New Haven & Hartford R.R., 82 I.C.C. 45.

The second of these two cases is helpful because it shows (82 I.C.C. 46) that upon the issuance of a certificate of abandonment the carrier authorized would, by force of the statute, be relieved from burdensome obligations under mortgages.

The question before this Court concerns only the effect on the agreement of October 25, 1899, of the amended Interstate Commerce Act and action thereunder. The question of the effect of the statute upon the lease of the Hartford & Connecticut Western to the petitioner is not involved and has no bearing on the decision of the case at bar. The nature of that *lease* is quite different from the nature of the *license* or *trackage contract, Exhibit 3.* The lease involves the transfer of exclusive possession and control of the property. The payment of rent thereunder is a fixed charge. Abandonment of the line from Feeding Hills to Agawam Junction does not change the petitioner-lessee's possession and control of the property. The petitioner remains in possession of and operating the extensive property leased to it by the Hartford & Connecticut Western.

The contract, on the other hand, gave the petitioner only a very limited right to a regulated use. The payments thereunder were operating charges. The prescribed use of the tracks was premised upon and was impossible without the operation whose abandonment was authorized by the Commission. The lease of the Hartford & Connecticut Western to the petitioner is not involved in efficient execution of the action authorized by the particular order entered by the Commission.

As noted above, the case at bar concerns only the effect on private contracts of Congressional legislation under the commerce clause of the Constitution. By the particular

legislation involved Congress has thoroughly occupied the field. The numerous authorities cited on pages 16 to 19 of this brief and dealing with the interstate commerce legislation are the authorities which control the situation at bar. Cases involving state statutes are no authority for the interpretation of Federal legislation under the Constitution, particularly as the decisions of this Court involving such statutes carefully refrain from giving any decision of the precise question of liability for damages involved here. *Ortega Co.* v. *Triay*, 260 U.S. 103, and *Armour Co.* v. *Dallas*, 255 U.S. 280, cannot, therefore, be considered as helpful authority in the case at bar.

It should be noted that, although the petitioner contends that the amended Interstate Commerce Act and the certificate and order of the Commission issued thereunder are a complete defense to the action brought, the record (pp. 29, 30, 36, and 37) raises the question as to whether or not the statute and certificate of the Commission had any effect on the petitioner's obligation. It is therefore open to this Court to limit or define the extent of protection given to the petitioner. And in so doing, this Court may examine for itself and determine the nature of the contract sued on and the facts alleged to bar the claim of right under the Federal Statutes asserted by the petitioner. See *Railroad Comm. of Texas v. Eastern Texas R.R. Co.*, 264 U.S. 79, at 87.

5. The Opinion of the Supreme Judicial Court of Massachusetts.

The opinion of the Supreme Judicial Court of Massachusetts dismissing the petitioner's exceptions assumed (Rec. p. 67) that Congress, in enacting paragraphs 18 to 20 of section 1 of the amended Interstate Commerce Act, authorized the Commission to sanction the abandonment by an interstate carrier of a contractual obligation such

as existed in the case at bar. Having made this erroneous assumption the Massachusetts Court decided that the Commission had not exercised its authority sufficiently to protect the petitioner, because it did not appear clearly that the Commission intended to deprive the respondent of its rights under the agreement with the petitioner (Rec. p. 69).

The Massachusetts Court then proceeded to draw support for its view of the Commission's intention from the facts:

(*a*) That the respondent was not a party to the proceeding before the Commission;

(*b*) That the application of the petitioner had been submitted to the Commission "without a formal hearing"; and—

(*c*) That it was not to be supposed that the Commission intended to adjudicate the $15,000 annual payment as an operating charge of the petitioner, it being the Massachusetts Court's suggestion that the annual $15,000 could have been found to be a fixed, and not an operating, charge (Rec. p. 69).

The learned Supreme Judicial Court is in error as to the possibility of the $15,000 charge being classed as a "fixed charge," because, as demonstrated on pages 33 to 38 of this brief, such a charge has been generally and specifically held an operating charge by the Commission and the parties. The authorities cited (Rec. pp. 69-70) by the Masachusetts Court in support of its suggestion are not in point, for they contain no discussion of the problem, which did not arise directly, and they were decided either before or without reference to the powers of the Interstate Commerce Commission over the accounting of carriers. It is submitted, therefore, that on this question of the nature of the annual payment the Massachusetts Court is without support.

And, furthermore, the Massachusetts Court erred in holding that the specific intention of the Commission as to the particular contract was material to the problem. The Court entirely overlooked the fact demonstrated on pages 30 and 31 of this brief that the effect of the amended Interstate Commerce Act on private contracts is the effect of the Act and intention of Congress rather than of the Commission, so that the specific intention of the Commission as to any particular contract is immaterial. As shown above, in sections 2 and 4 (*d*) of this brief, the Commission administers the provisions of the statute, and exercises its judgment on certain delegated problems, and, that judgment being exercised in accordance with the statutory provisions, the effect on related contracts is the effect of Congressional action.

It follows that the fact that the application was submitted "without a formal hearing" cannot be used to support a lack of intent which is not involved in an application of the statute. And, furthermore, this fact cannot properly be used as indicative of the Commission's action, because the petitioner complied with all provisions of the statute. The proceeding before the Commission was proper. Prior to the cessation of operation the respondent had notice and a full opportunity to go before the proper tribunal (see p. 32 of this Brief).

> *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 49.

These errors naturally developed from the erroneous original assumption made by the Court, that the Commission had power to directly sanction the abandonment of an *obligation* (Rec. p. 67). This assumption was apparently made as being the first step in determining the effect of action by the Commission. It is erroneous because, under paragraphs 18 to 20 of section 1, the Commission deals primarily with abandonment of lines of railroad. The

Commission does not abrogate contracts; the Act of Congress does that. By force of the statute contracts involved in an operation whose abandonment is authorized by the Commission are modified or abrogated with impunity to the extent necessary for an unhampered accomplishment of the recognized purpose of the legislation.

The recognized purpose of Congress was to build up and ensure a national transportation system. The protection of that purpose becomes particularly and immediately effective whenever the Commission exercises its judgment on the facts presented and rules that public convenience and necessity permit or require something. The Commission administers the purpose of Congress so as to permit the owners of the railway properties to earn enough to adequately serve the public.

Dayton-Goose Creek R.R. v. *United States*, 263 U.S. 457.

It follows that the true analysis of the situation at bar is that the petitioner is protected from the liability sought to be enforced against it because that liability arose from an operation which was a burden on interstate commerce and the abandonment of which was authorized by the Commission in the interests of interstate commerce.

6. The Congressional Purpose would be Nullified by the Enforcement against the Petitioner of the Liability Involved in the Case at Bar.

In a case of a carrier's operation of a branch line under such an agreement as existed in the case at bar, it might very well be that the carrier, by continuing operation of the branch, would only lose, including payment of a $15,000 contract charge, $5000. Under such circumstances, if the Commission issued a certificate and order authorizing abandonment, and the carrier relied on the order and ceased operation only to face a liability for damages at the

full contract rate of $15,000 a year, it would appear clearly that the Commission's certificate and order had been absolutely ineffective in protecting from a burden the interstate operations of the carrier authorized. This result is contrary to the purpose and intent of the legislation, and would greatly hamper and restrict the efficient execution of the power of Congress. It follows that in such a case the carrier authorized would be protected from liability on the contract.

The contract relation is the same in the case at bar, where the carrier happens by operation to be losing more than the full contract charge. The difference in circumstances cannot affect the application of the statute, because those circumstances are all matters for the Commission to consider in the exercise of its judgment as to the issuance of a certificate. An unconditional certificate having issued, the circumstances of the particular operation have no proper effect upon the legal relation between the operating contract and action taken by virtue of the Commission's order. The same principle, therefore, which clearly protects the carrier in the $5000 case above suggested, requires that the petitioner at bar be free from liability.

If liability for payments at the rate of $15,000 a year is to continue, the certificate of abandonment has been no relief to the interstate operations of the petitioner, and the very purpose of the Congressional action is defeated. It results, therefore that a certificate and order of authorization by the Commission should protect the carrier authorized from liability necessarily and directly resulting from an efficient execution of the abandonment of an operation which was a burden on interstate commerce and which was authorized by the Commission in the interests of interstate commerce.

Texas v. *Eastern Texas R.R.*, 258 U.S. 204; 264 U.S. 79.

Colorado v. *United States*, 271 U.S. 153.

Furthermore, if a carrier is not free from a civil liability necessarily consequent upon action authorized by the Commission to relieve a burden on interstate commerce, it will mean that the carrier will be hampered and thwarted in carrying out its part in the development of the national system.

Congress intended the legislation to develop and ensure a national transportation system and to relieve burdens from the performance by carriers of their interstate duty. If the liability for damages involved in the case at bar is enforced agninst the petitioner, it will mear nothing more than that the petitioner's operations are to be subject to a burden of pure tribute to the respondent.

Such a result would certainly thwart the "fostering guardianship and control" of the Commission, for the judgment of other persons would be substituted for that of the Commission. It would render ineffective, as one of the means by which the Congressional purpose is to be achieved, the paragraphs 18 to 20 of section 1 of the amended Interstate Commerce Act. It would nullify the recognized purpose of the Congressional legislation.

Texas v. *Eastern Texas R.R., supra,* at 216.
Colorado v. *United States, supra.*

It follows that the statute should be construed in line with the recognized Congressional purpose and authorities, so as to avoid nullification, and therefore include protection for the petitioner in the case at bar.

If the agreement in the case at bar was one which required the petitioner to operate its trains into Springfield, the *Colorado* case (271 U.S. 153) is conclusive that the respondent could not have specific performance of that agreement. In such a case the petitioner would be protected from the obligation to perform because performance entailed a burden on its other interstate operations, relief from which, in the building up of the national system, the

Commission found was permitted by public convenience and necessity. The *obligation* of the contract to perform was subject to an infirmity that Congress might legislate with respect thereto. By the passage of the amended Interstate Commerce Act Congress did so legislate and unequivocally expressed its intention that a carrier be relieved of a contract for operation creating a burden on interstate operations when the Commission certifies that public convenience and necessity permitted the abandonment of that operation. The opinion of this Court in the *Colorado* case covered exactly this case (271 U.S. 153, at 165). The opinion in the *Texas* case carefully provided for it (258 U.S. 204, at 216).

Now it cannot be supposed that the Congressional power to legislate with respect to interstate commerce is so limited that, although it will protect from an obligation to perform, it will allow damages, the law's inadequate substitute for performance. If damages were allowed in lieu of the specific performance which could not be had, it is obvious that there would be no relief to the interstate operations of the respondent. The allowance of damages would nullify the effect of the Congressional action. It must be that the amended Interstate Commerce Act in a proper case protects a carrier from damages as well as from an obligation to perform.

Assuming, as above suggested, that an obligation to operate into Springfield did exist in the case at bar, it has been rendered unenforcible, and the petitioner would not be liable in damages. *A fortiori* the petitioner is protected from liability for damages in the case at bar.

The liability sought to be enforced against the petitioner in the case at bar arises from a contract which the Commission found to be a burden on the petitioner's interstate operations. The petitioner could not possibly use the privileges of the contract after taking the specific action authorized by the Interstate Commerce Commission.

Future payments to the respondent would be received for no service rendered or expense incurred. Clearly, the Congressional purpose protects the petitioner from the liability at bar which is incidental to the relieving of its interstate operations from a burdensome operation.

We therefore submit that the petitioner should be protected in this action for damages because—

1. Private contracts dealing with interstate commerce are subject to an infirmity that Congress may act thereon.

2. Congress has acted with broad scope and purpose to build up a national transportation system, and has passed the Transportation Act of 1920.

3. Authority and reason show that the legislative action of Congress and the Interstate Commerce Commission are sufficient in scope to relieve the petitioner's interstate operations from the burden of the contract from which has arisen the liability sought to be enforced in the case at bar.

II. There was No Jurisdiction in the Massachusetts Courts to Hear the Cause.

Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission can be brought only in the Federal District Court. The jurisdiction of the District Court in such cases is exclusive. This results from the fact that this jurisdiction, vested in the Commerce Court by section 207 of the Judicial Code of March 3, 1911, was transferred by Act of October 22, 1913, to the District Courts.

Act of March 3, 1911, c. 231, sec. 207; 36 U.S. Stat. at Large, 1087.

Act of Oct. 22, 1913, c. 32; 38 U.S. Stat. at Large, 219.

United States Comp. Stats. 1916, secs. 992, 993, 997, 998.

28 U.S. C.A. 41 (27-28 and footnote); 28 U.S. C.A. 46.

The motion to dismiss is not affected by the fact that it may not appear on the face of the pleadings that the suit is essentially one to annul or suspend in whole or in part an order of the Commission. When, by filing of the motion or during the trial, it does develop that the suit is essentially for that purpose, the motion to dismiss should be allowed for want of the Court's jurisdiction over the subject-matter and the lack of the United States as a party.

Lambert Run Coal Co. v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377.

It is not necessary that the suit expressly seek to annul or set aside an order of the Commission. It is enough to bring the action within the exclusive jurisdiction of the Federal District Court that it is sought to prevent the petitioner from doing what the order authorizes, because that is equivalent to asking that the order be adjudged invalid.

Venner v. *Michigan Central R.R. Co.*, 271 U.S. 127.

Illinois Central R.R. Co. v. *State P.U. Comm.*, 245 U.S. 493, 504, 505.

North Dakota v. *Chicago & Northwestern R.R.*, 257 U.S. 485.

State of Louisiana v. *Morgan's Louisiana & T.R. & S.S. Co.*, 18 F. (2d) 645.

The case at bar is on all fours with the above four cases except that they were bills in equity to enjoin or nullify orders of the Commission and the instant case is a suit at law whose inevitable result must be to nullify and suspend at least in part an order of the Commission by putting upon the petitioner one of the very burdens which was found by the Commission in the proceeding before it.

The substance of the respondent's argument in the case at bar rests on the claim that the Commission's order has no application to the agreement sued on. The attempt is to limit the application of the order, suspend its operation as against the agreement sued on, and annul its effect to a certain extent.

The facts and figures of the situation were before the Commission in the proceedings for the order authorizing abandonment. Upon the whole question the Commission acted, and the respondent cannot in a state Court suspend or annul that action. The tribunal for determination of such matters is prescribed by the United States statutes referred to above. The respondent would, in the case at bar, have the state Court determine the effect and interpretation of action taken under a Federal statute on interstate commerce, a matter confided by the United States Constitution to Congress and on which Congress has fully acted. It is just that sort of case that is properly brought only in the Federal District Court.

> *North Dakota* v. *Chicago & Northwestern R.R.*, *supra.*
>
> *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, *supra.*

The permissive nature of the order makes no difference so far as this question is concerned.

> *Chicago Junction Case*, 264 U.S. 258, and cases cited.

Either this certificate and order of the Interstate Commerce Commission is a complete defense to this action for damages, or else the action becomes a suit to annul in part the effect of the order and the purpose of its issuance.

The petitioner's amended motion to dismiss should therefore have been allowed on the fourth ground (Rec. p.

45), because the action brought must inevitably be a suit which would directly or indirectly annul or suspend, at least in part, the order of the Interstate Commerce Commission entered in Finance Docket 1479.

III. Conclusion.

The petitioner therefore contends that a mandate should issue from this Court ordering judgment to be entered for the defendant by the Superior Court of Massachusetts. That Court has denied to a certificate of the Interstate Commerce Commission any effect whatsoever. The recognized legislative purpose will be nullified unless the Commission's certificate accomplishes protection to persons acting thereunder.

Congress, acting under the commerce clause of the Constitution with a recognized broad purpose, passed the Transportation Act of 1920.

The Interstate Commerce Commission issued a legislative order which specifically authorized the petitioner to abandon a line of railroad. Operation of that line was a burden on other interstate operation. The petitioner, in pursuance of the mandates of the Transportation Act (see section 15*a* (2) and (3)), abandoned the line. The abandonment of that line involved the petitioner's ceasing operation into Springfield and the use of the tracks covered by the contract sued on. After the abandonment it was physically and legally impossible for the petitioner to operate under the contract. The petitioner should therefore, as matter of law, by force of the Acts of Congress, be protected from liability on the contract in a suit, such as the one at bar, brought as a direct result of action taken in efficient execution of the Commission's order.

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Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 532.

CENTRAL NEW ENGLAND RAILWAY COMPANY,
PETITIONER,
v.
BOSTON & ALBANY RAILROAD COMPANY, ASSIGNOR FOR THE BENEFIT OF THE NEW YORK CENTRAL RAILROAD COMPANY, ASSIGNEE,
RESPONDENT.

ADDITIONAL BRIEF FOR THE CENTRAL NEW ENGLAND RAILWAY COMPANY.

This additional brief is submitted by the petitioner for the purpose of bringing to this Court's attention that the general nature and particular provisions of the agreement of October 25, 1899, on which was brought the case at bar, show the agreement to be of such a nature that the petitioner should be protected from the liability imposed upon it.

THE AGREEMENT IS SUBJECT TO AN INFIRMITY THAT CONGRESS MAY LEGISLATE WITH RESPECT THERETO.

The agreement was between two interstate carriers. The particular provision on which rests the respondent's claim was in reality a fixing by the parties to it of a rate to be

paid for services rendered over a period of years. Whether the agreement was a contract or a license, as it is described by the respondent, the fact remains that in its essence it was a permission granted to the petitioner to use the tracks of the respondent and to pay for that use at a definite price. Fundamentally the agreement was a regulation of transportation expense by the parties thereto. It was the fixing of a definite price for the operating of trains in commerce between the states. It was an attempt on the part of the carriers themselves by agreement to regulate interstate commerce. As such a regulation, it is elementary that the contract is subject to an infirmity that Congress may legislate with respect to it even to the extent of relieving parties from obligations imposed by it. The parties to this contract, being interstate carriers, clearly must have had in their minds at the time of making the contract this infirmity which is created by the interstate commerce clause of the Federal Constitution. It is submitted, therefore, that the rate regulatory nature of this agreement directly involving interstate commerce is such that authority and cases applicable to an ordinary contract between private parties are not in point.

This view of the agreement or contract or license itself runs throughout the case and can never be disregarded. It distinguishes the situation in the case at bar from all other cases.

The parties understood, and the Interstate Commerce Commission has ruled, that the $15,000 annual charge imposed by this contract was an operating, as distinguished from a fixed, charge (see pp. 32 to 38 of the petitioner's brief). Operation of the line whose abandonment was authorized necessarily involved the payment of this charge. Without operation of that branch, payment of the charge is a payment by way of pure tribute for absolutely no service rendered. After the abandonment it was physically and legally impossible for the petitioner to operate. Pay-

ment for all past services rendered had been made. Future payments, which were the only subject of the suit at bar, would really be a penalty paid by the petitioner to the respondent for services which the respondent could not render and the cessation of which put no expense upon the respondent.

Decision of the case at bar in favor of the petitioner does not involve any doctrine as to the effect of the amended Interstate Commerce Act upon leases, mortgages or other claims. The only question before the Court, and the only question involved in the case at bar, is the effect of that statute and action thereunder upon the particular contract in suit. The nature of that contract is quite different from the nature of a lease or mortgage (see pp. 42, 43 of the petitioner's brief). The intention of Congress as to them may well differ from its intention as to an operating trackage agreement such as the one at bar.

It is immaterial that the Massachusetts Courts have held the agreement sued on to be of such a nature that the respondent is a creditor of the petitioner, because that question is one of law under the Federal Constitution and statutes. It is the very question now before this Court. The authorities cited on pages 24 to 28 of the petitioner's brief and in this additional brief show that this Court has already recognized the intention of Congress so to legislate with respect to such an agreement as the one at bar that the petitioner is protected in the action which it took and is therefore not a debtor to the respondent. The argument of the respondent's supplemental brief rests upon the theory that the respondent is a creditor by decision of the Massachusetts Courts and therefore is not affected by Congressional legislation. The argument is unsound because it erroneously assumes that the respondent is a creditor when the decision of that question, in view of the legislation under the commerce clause, is the one now before this Court.

Particular Provisions of the Agreement Show the Petitioner should be Protected.

It is not helpful to attempt to classify categorically the agreement and then to arrive at a solution as to the rights and liabilities of the parties on the basis of that classification. The agreement itself is the determining factor, and whether it is called a contract or a license makes no difference. That the privilege covered thereby is deemed irrevocable is unimportant. The essential question is whether the amended Interstate Commerce Act and action thereunder protect the petitioner from liability on the agreement. It is submitted that the various provisions of the agreement noted below show clearly that the contract is of such an operating nature that the petitioner should be protected by the legislative action of Congress and the Commission.

(*a*) The sixth paragraph of the agreement which deals specifically with payments by the petitioner provides only for making payments required in accordance with the terms. There is no provision or term of the agreement that the $15,000 be paid irrespective of operation.

(*b*) Quarterly payments were to be made. They, of all means of payment, would be most commensurate with operation. The payments were to begin only with use at an indefinite time (*i.e.*, the opening of the branch line for regular trains), they were to continue on quarterly dates if the license was used and they were to cease, not at the end of a quarter or when any certain sum has been paid, but, with operation, in the middle of a quarter on August 30, 1940.

(*c*) The word "therefor," as it appears after "paying to the Albany Company" in the sixteenth line of the first paragraph of the agreement, naturally refers back to the phrase "to pass with trains and locomotives over the lines," and indicates that the money was to be paid only

for operation, *i.e.*, when trains passed over. The whole phrase when stripped of unnecessary words is "to license and permit the Central New England Railway Company to pass with trains over the line of the Albany." The agreement covered operation, and when that operation ceased in accordance with Congressional action no further payments should be made.

(*d*) The "whereas" clauses of Exhibits 3 and 28, and the fact that the respondent acquired no right to independent operation from Agawam Junction to Springfield, show clearly that the agreement was entirely dependent upon the construction and operation of the line of the petitioner from the south to Agawam Junction. When with Congressional sanction that line ceased to exist, the opportunities and privileges provided for by the agreement would naturally cease to have any purpose.

(*e*) The provision of paragraph first for compensation to the Boston & Albany, if the daily average number of trains exceeds six, requires additional payments in the proportion in which the additional trains exceed six, so that the petitioner is obliged to pay $2500 per train for those in excess of six when and if it runs those trains and uses the facilities. The payments for passage with trains are operating payments for service and facilities. The annual $15,000 payment was for such service and facilities for up to six daily trains in both directions.

(*f*) By paragraph three the respondent, if the petitioner used the privileges and facilities mentioned in the agreement, is under obligation for the prescribed $15,000 annual payment to sell tickets, handle baggage, take care of passenger trains in its passenger yard and transfer through passenger cars to connecting lines. These are services compensation for which was to be received from the fifteen thousand dollar payments. They are services of a distinctly operating nature, for without the existence of the

line there would be no occasion for these services. The provision of the first paragraph as to sharing in the expense of maintaining water stations is based entirely upon compensation for actual use. The same is true of the provision as to the use of engine house stalls. The entire agreement is based on payment by the petitioner for service rendered or use received during operation. The words which deal with the fifteen thousand dollar item are in harmony with the whole contract.

It is therefore submitted that the terms of the particular agreement involved in the case at bar show it to be of such a nature that it is clearly within the recognized scope of the amended Interstate Commerce Act. It follows that the respondent cannot collect from the petitioner a sizeable penalty for action taken by the petitioner under and in pursuance of that Act.

This analysis and examination of the provisions of the contract with a view to determining its nature and the relation of the Congressional legislation and action thereunder is clearly within the province of this Court.

> *Railroad Comm. of Texas* v. *Eastern Texas R.R. Co.*, 264 U.S. 79, and cases cited therein at page 84 (see petitioner's brief, p. 43).

Cases in this Court and from England relied on by the respondent to show that the agreement should be catalogued as an irrevocable license so that it cannot be affected by action of Congress are not in point. Two cases in this Court, *Union Pacific Railway Co.* v. *Chicago &c. Ry. Co.*, 163 U.S. 564, and *Rock Island Ry. Co.* v. *Rio Grande Ry. Co.*, 143 U.S. 596, were cases involving agreements containing elaborate "whereas" clauses by which the railroad in the position of the respondent in the case at bar did let the other party to the contract into "full, equal, joint and perpetual possession and use" of certain tracks and build-

ings. The contracts also contained provisions that the rights thereof should attach and run with the railways of both parties during their corporate existence. There is nothing in the agreement involved in the case at bar which could be construed to have the same effect as these provisions of the contracts construed in the above cases. That language was vital to the result of those cases. It follows that those cases are no authority in connection with the relation of the amended Interstate Commerce Act and the agreement involved in the case at bar.

The same situation is true with respect to the English cases of *Great Northern Railway Company* v. *Manchester, Sheffield &c. Railway Company*, 5 DeGex & S.M. 138, and *Llanery Ry. & Dock Company* v. *London N.W. Railroad Company*, L.R. 8 Ch. Apps. 942; 7 H.L. 550, referred to on page [illegible] of the respondent's supplemental brief, because those decisions relied upon terms of the agreements involved which do not exist in the contract in the case at bar. Those English cases are really authorities in favor of the petitioner because it was indicated that without the special terms, which showed a much greater transfer of possession and control than under the agreement at bar, a contrary result would have been reached.

Furthermore, these and the other authorities relied on by the respondent on pages [illegible] to [illegible] of its supplemental brief are inapplicable, because, as noted above, it is unimportant that the privileges covered by the agreement are deemed irrevocable.

In this connection the attention of the Court is called to an improper interpretation by counsel for the respondent on pages [illegible] and [illegible] of its supplemental brief of the petitioner's argument on pages 41 and 42 of its brief. Two opinions of the Interstate Commerce Commission are there referred to by the petitioner as showing action of the Interstate Commerce Commission under paragraphs 18 to 22

of section 1 of the amended Act. The context of the petitioner's brief shows that the reference to these reports was only to show that the Commission itself had used language indicating that the action of Congress was sufficiently broad to accomplish the modification of "burdensome obligations *under* mortgages" (italics ours). In its brief the petitioner made no general contention with regard to the effect of the Congressional legislation and action thereunder upon "such obligations as mortgages." That question is not involved in the case at bar. It is unnecessary for the petitioner or the Court to take any position with respect to it.

On the basis of this argument the respondent states that the petitioner's contention extends "to such burdensome obligations *as* mortgages" (italics ours). It is respectfully submitted that the language of the petitioner's brief "burdensome obligations *under* mortgages," which is taken from the report of the Interstate Commerce Commission (82 I.C.C. 46), does not mean what the respondent seeks to make it mean.

Argument cannot be made against petitioner's position on the theory that the petitioner itself voluntarily created a situation which has resulted in the non-performability of the contract because Congress and the Commission representing and acting for the public and interstate commerce as a whole have taken the action under which the petitioner claims protection. Because of this legislative sanction the petitioner, in acting thereunder, is not to be prejudiced by reason of its initiative in obtaining that sanction (see pp. 29 and 30 of petitioner's brief). Indeed, the mandate of section 15a of the amended Act left the petitioner no alternative but to abandon what it could operate only as a heavy drain on its other operations (see pp. 25 and 29 of petitioner's brief).

Conclusion.

The agreement of October 25, 1899, Exhibit 3, on which suit has been brought, was an agreement involving interstate commerce which was essentially a regulation by the parties of the cost of operation in interstate commerce. The parties must be held to have made the agreement with a view to the infirmity that Congress might legislate under the commerce clause to affect the obligations or liabilities of parties to it. Congress has acted in this connection and passed the amended Interstate Commerce Act. The Interstate Commerce Commission has acted in a proceeding under the provisions of the statute and issued a certificate authorizing the abandonment of a line of railroad whose continued operation was a burden on the interstate operations of the petitioner. The petitioner's liability in this case represents a payment, necessarily incidental to the operation of the line abandoned, which was found by the Commission to be a part of the operating burden of that line. After the abandonment so authorized it was legally and physically impossible to operate under the agreement. The agreement of October 25, 1899, Exhibit 3, is clearly of such a nature that it is within the scope of the Congressional enactment and action thereunder. It follows as matter of law that the recognized Congressional purpose protects the petitioner from the liability involved in the case at bar.

New York v. *United States*, 257 U.S. 591.
Texas v. *Eastern Texas R.R. Co.*, 258 U.S. 204.
New England Divisions Case, 261 U.S. 184.
Colorado v. *United States*, 271 U.S. 153.

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